

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PHAN HUE, :  
Petitioner :  
 : Civil Action No. 1:01-cv-01064  
-VS- :  
 : (JUDGE YVETTE KANE  
JAMES UPDIKE, et al., :  
Defendants :  
 :

**FILED  
SCRANTON**

SEP - 2 2004

MARY E. D'ANDREA, CLERK  
per 77  
DEPUTY CLERK

REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S  
MOTION FOR RELIEF FROM JUDGEMENT PURSUANT  
TO RULE 60(b), FRCP

Plaintiff, Phan Hue, Pro Se, requested relief pursuant to Rule 60(b) from the Order entered June 25, 2003, dismissing the above action without prejudice based on Plaintiff's failure to exhaust available administrative remedies prior to commencing this action. Plaintiff averred the Defendant's did not plead failure to exhaust in their Motion to Dismiss sufficiently to compel this Court to dismiss the complaint in its Order of May 10, 2002, which adopted the Report and Recommendation by Magistrate Judge Smyser that the Defendant's Motion to Dismiss be denied.

The Defendant's in their Opposition claims Plaintiff has failed to articulate any basis under Rule 60(b), which would permit this Court to rescind its dismissal of his Complaint, failed to demonstrate that the Defendants waived his failure to exhaust administrative remedies as a defense and has waited too long to do so. Plaintiff disagree.

In addition to the Defendants failure to plead failure to exhaust in their Motion to Dismiss sufficiently to compel this Court to dismiss the complaint in its Order of May 10, 2002, Plaintiff can sufficiently plead exhaustion of administrative remedies with respect to poor prison conditions and medical

mistreatment, where he maintains that he filed a formal grievance, that was resolved in his favor.

On March 10, 2000, Plaintiff submitted a request to Superintendent Klem on his injury and recommendation to see a specialist. A copy of this request is marked as Exhibit "A" and attached hereto. In his response, Superintendent Klem advised Plaintiff to work with medical staff. See Exhibit "A".

On April 12, 2000, Plaintiff submitted grievance No. RET0112-00 on his medical treatment. A copy of this grievance is marked as Exhibit "B" and attached hereto. Plaintiff received an Initial Response dated April 14, 2000. A copy of this response is marked as Exhibit "C" and attached hereto. Plaintiff further submitted a request to Defendant O'Brian, Food Service Manager, concerning his pain as a result of his work detail. A copy of this request is marked as Exhibit "D" and attached hereto. In his response Defendant O'Brian took action and awaited a decision from medical concerning his kitchen assignment. See Exhibit "D". Plaintiff subsequently submitted a request dated May 6, 2000, to Defendant Mataloni, Health Care Administrator, concerning his problem. A copy of this request is marked as Exhibit "E" and attached hereto. In his response dated May 10, 2000, Plaintiff received a favorable response. See Exhibit "E"

The object of filing a grievance is to get a favorable decision, so once that happens, its over and exhaustion is completed but also seeks damages.

A prisoner may not bring an action "with respect to prison conditions" under any federal law until he has exhausted available remedies. 42 U.S.C. § 1997(e)(a); Hanson 37 F.Supp.2d at 40-01.

The Pennsylvania department of Corrections has set forth the administrative remedies available to prisoners in its Consolidated Inmate Grievance System DC ADM 804, See Jones v. Oldt, 30 F.Supp.2d 491, 495 (E.D.Pa. 1998); see also 97 Pa.Const.Stat.Ann. § 93.9(a)(1999). To exhaust the formal grievance procedure established by the Pennsylvania Department of Corrections, a prisoner must first file a grievance. If he is not satisfied with the result, he must then appeal the initial review to the Superintendent, and if he is still dissatisfied, he must appeal for final review which is conducted by the Secretary's Office Of Inmate Grievances and Appeals. The inmate handbook also provides for informal review.

Here, Plaintiff filed the formal grievance and exhausted his appeal to initial review and followed the recommendations at that stage. When further problems regarding the claim raised in Plaintiff's complaint arose, Plaintiff attempted to resolve them through informal means which were resolved in a favorable manner which cannot be appealed. Therefore, exhaustion of his administrative remedies with respect to the issue raised in his complaint were obtained.

For each of the foregoing reasons, this Court should grant Plaintiff relief from the judgement entered by this Court on June 25, 2003, dismissing the above action without prejudice.

  
Phan Hue, Pro Se Plaintiff

Dated: 8/30/04

DC-135A

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF CORRECTIONS

## INMATE'S REQUEST TO STAFF MEMBER

## INSTRUCTIONS

Complete Items Number 1-7. If you follow instructions in preparing your request, it can be disposed of more promptly and intelligently.

1. TO: (NAME AND TITLE OF OFFICER) <i>Superintendent Klem.</i>		2. DATE <i>5-10-2000</i>
3. BY: (INSTITUTIONAL NAME AND NUMBER) <i>Phon Hue DY0577</i>		4. COUNSELOR'S NAME <i>Ms. Simmons</i>
5. WORK ASSIGNMENT <i>Kitchen</i>	6. QUARTERS ASSIGNMENT <i>A A- 10</i>	
7. SUBJECT: STATE COMPLETELY BUT BRIEFLY THE PROBLEM ON WHICH YOU DESIRE ASSISTANCE. GIVE DETAILS.		

Dear Sir: I was injured on Feb 28, 2000 in the kitchen, while I was working. On 2-28-2000 I was taken to the local hospital and the doctor recommended I see a bone specialist that has not been done. I am still in a lot of pain and my right arm, shoulder is not getting any better. The pain is traveling down my back also. I've written to Mr. Mattaloni and he still has not been taken to see the bone specialist. I have been forced to return to work and my injury is getting worse. Will you please help me so that I don't have permanent damage to my shoulder, also I had to have my teeth removed due to the accident.

Mr. Hue,  
I have reviewed your medical record and have discussed your concerns with the medical staff.  
An X-Ray has been ordered and you were given a medical instruction. Please continue to deal with the medical staff.

RECEIVED

MAY 11 2000

STAFF MEMBER

cc: Mr. Mattaloni

☐ TO DC-14 CAR ONLY☐ TO DC-14 CAR AND DC-15 IRS

STAFF MEMBER

Exhibit "A"

DATE

DC-804  
PART 1COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF CORRECTIONS  
P.O. BOX 598  
CAMP HILL, PA. 17001-0598

mat ✓

OFFICIAL INMATE GRIEVANCE

GRIEVANCE NO.

RET0112-00

TO: GRIEVANCE COORDINATOR	INSTITUTION SLI Retreat	DATE 4-12-2000
FROM: (Commitment Name & Number) HUE PHAN DY0577	INMATE'S SIGNATURE <i>[Signature]</i>	
WORK ASSIGNMENT (Previous) Kitchen Worker	QUARTERS ASSIGNMENT A-A-10	

## INSTRUCTIONS:

1. Refer to the inmate handbook Page 12 and DC-ADM 804 for information on the inmate grievance system.
2. State your grievance in Block A in a brief and understandable manner.
3. Next, you are required to list in Block B the specific actions you have taken to resolve this matter. Be sure to include the identity of staff members you have contacted.

## A. Brief, clear statement of grievance:

I'm Filing this greivance towards MATT Ahami head of the medical Department. Because I had an accident in the kitchen where I used to work Feb 28, 2000 was the Date. I hurt my shoulder and my teeth were Broke when I fell. My shoulder was looked at by A Doctor at an outside hospital, he said it was not broke but I need to see A Bone spencilist I was given pain medication, then I was taken off it. After A month. Im still having terrible pain in my shoulder, I have went to sick call A numerous amount of times and the assistant physician tells me Im okay and I don't need A sling or medication no more. I can not hardly move my shoulder I explained all of the complications I'm having and They will not listen something is wrong, or I wouldn't have to see A Bone Specialist. I just want A Pain Reliever till they Do something.

## B. Actions taken and staff you have contacted before submitting this grievance:

Have went to sick call, seen the Assistant Physician, he never lets me see A Doctor.

Exhibit "B"

our grievance has been received and will be processed in accordance with DC-ADM 804.

*[Signature]*

Signature of Grievance Coordinator

4-13-00

Date

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF CORRECTIONS  
P.O. BOX 698  
CAMP HILL, PA 17001

OFFICIAL INMATE GRIEVANCE  
INITIAL REVIEW RESPONSE

GRIEVANCE NO. **RET 0112-00**

TO: (Name & DC NO.)	INSTITUTION	QUARTERS	GRIEVANCE DATE
<b>HUE PHAN, DY-0577</b>	<b>SCI-RETREAT</b>	<b>A-UNIT</b>	<b>4/12/00</b>

The following is a summary of my findings regarding your grievance:

This Grievance was referred to Mr. Mataloni, designated Grievance Officer for this type of Grievance.

Mr. Mataloni reports, "What medication is given and for how long is the decision of the M.D. or P.A. This is a medical decision made by the Practitioners."

If you are having problem with your medication, you should sign up for Sick Call again.

JLL/mts

*Exhibit C*

Refer to DC-ADM 804, Section VIII,  
for instructions on grievance  
system appeal procedures.

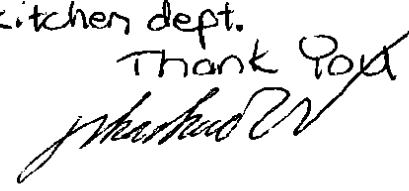
SIGNATURE OF GRIEVANCE COORDINATOR

DATE

*J. Lynd*

*4-14-2000*

XC: Mr. D. Hazlak A Block  
medical  
File - Ps. Supvs

DC-135A		<b>COMMONWEALTH OF PENNSYLVANIA</b> <b>DEPARTMENT OF CORRECTIONS</b>	
INMATE'S REQUEST TO STAFF MEMBER		INSTRUCTIONS	
		Complete Items Number 1-7. If you follow instructions in preparing your request, it can be disposed of more promptly and intelligently.	
1. TO: (NAME AND TITLE OF OFFICER)		2. DATE	
Mr Edward O'Brien Food Service Manager		5-6-00	
3. BY: (INSTITUTIONAL NAME AND NUMBER)		4. COUNSELOR'S NAME	
PHAN Hue DY0577		Ms Simmons	
5. WORK ASSIGNMENT		6. QUARTERS ASSIGNMENT	
Kitchen		A-Block AA-10	
7. SUBJECT: STATE COMPLETELY BUT BRIEFLY THE PROBLEM ON WHICH YOU DESIRE ASSISTANCE. GIVE DETAILS.			
<p>Since I have been back to work, I am still suffering from severe pain in my right shoulder and arm, since my fall in the kitchen my last time at work. I am being forced to work heavy labor when staff recognizes my poor or hampered use of my right shoulder and arm. Mr O'Brien would you please schedule me for light duty work only till my medical problems have been cleared by necessary physician. At the beginning of my injury I was by the DOC medical dept. referred to a outside attending physician which that physician said that I need to see a Bone specialist for my shoulder problem. To this date and time I have not been seen by any such doctor. Till this issue is addressed and resolved would you please respond back to me on the issues that</p>			
8. DISPOSITION: (DO NOT WRITE IN THIS SPACE) concern you and the kitchen dept.			
<p>Thank You  </p> <p>I CONTACTED MR. HAZLAK WHO IN TURN WILL CONTACT Medical FOR AN EVALUATION OF MEDICAL STATUS. AT THIS POINT - 05/08/00 YOU ARE PENDING A Decision FROM Medical STILL ASSIGNED TO THE KITCHEN.</p> <p>Ed O'Brien CFSE</p>			
<input type="checkbox"/> TO DC-14 CAR ONLY		<input type="checkbox"/> TO DC-14 CAR AND DC-15 IRS	
STAFF MEMBER		DATE	
Exhibit 70			

DC-135A

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF CORRECTIONS

## INMATE'S REQUEST TO STAFF MEMBER

## INSTRUCTIONS

Complete Items Number 1-7. If you follow instructions in preparing your request, it can be disposed of more promptly and intelligently.

1. TO: (NAME AND TITLE OF OFFICER)

Joseph Mataloni Health care administrator

2. DATE

5-6-00

3. BY: (INSTITUTIONAL NAME AND NUMBER)

Phan Hue DY0577

4. COUNSELOR'S NAME

Ms Simmons

5. WORK ASSIGNMENT

Kitchen

6. QUARTERS ASSIGNMENT

A-Block AA10

7. SUBJECT: STATE COMPLETELY BUT BRIEFLY THE PROBLEM ON WHICH YOU DESIRE ASSISTANCE. GIVE DETAILS.

I am not aware if I have Been taken off of medical Restriction due to my still present shoulder condition. I have been put Back to work in the Kitchen and at Block janitorial labor. I am having terrible pain in shoulder and slight numbness in lower part of right arm. I was last referred to a outside physician by the DOC medical doctor because Injury was to technical to treat in house. The outside doctor said I would need to see a Bone specialists for proper treatment and/or diagnosis. This has not Been done and I feel that I am being denied proper medical services. Please respond soon as can

Thank you

8. DISPOSITION: (DO NOT WRITE IN THIS SPACE)

Mr Hue,

Sign-up An sick - call + Ask the PA about work restrictions He will Address your concerns.

☐ TO DC-14 CAR ONLY☐ TO DC-14 CAR AND DC-15 IRS

STAFF MEMBER

J. NATALONI, CHCA

DATE

5/10/00



IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

PHAN HUE,	:	
Petitioner	:	
-VS-	:	Civil Action No. 1:01-cv-01064
	:	(JUDGE YVETTE KANE
JAMES UPDIKE, et al.,	:	
Defendants	:	


PROOF OF SERVICE

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that I served the foregoing REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR RELIEF FROM JUDGEMENT PURSUANT TO RULE 60(b), FRCP upon the person(s) and in the manner indicated below:

SERVICE BY FIRST CLASS U.S. MAIL ADDRESSED AS FOLLOWS:

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55 Utley Drive  
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Phan Hue, Pro Se Plaintiff  
No. DY-0577  
SCI Mahanoy  
301 Morea Road  
Frackville, PA 17932

Dated: 8/30/04